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IN THE

Supreme Court of the United States

October Term, 1957

No. 684

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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SUBJECT INDEX

	PAGE
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	3
Statement	3
Reasons for granting the writ	6
Conclusion	18

Appendices:

Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1
Appendix B. Judgment	App. p. 14

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Cudahy Packing Co. v. Holland, 315 U. S. 357	7, 12, 13, 14, 15
Fleming v. Mohawk Co., 331 U. S. 111	7, 12, 13
Fong Sik Leun v. Dulles, 226 F. 2d 74	16
National Labor Relations Board v. Duval Jewelry Co., 243 F. 2d 427	5, 6, 9, 17
National Labor Relations Board v. Guhaca, 230 F. 2d 542	5
National Labor Relations Board v. International Typographical Union, 76 Fed. Supp. 895	5
National Labor Relations Board v. John S. Barnes Corp., 178 F. 2d 156	5
National Labor Relations Board v. Pesante, 119 Fed. Supp. 444	4, 5, 6, 9, 17
United States v. Gredzens, 125 Fed. Supp. 867	12

RULES AND REGULATIONS

Rules and Regulations of the National Labor Relations Board (29 C. F. R. 102.1, et seq., Supp., 1956)	3
Rules and Regulations of the National Labor Relations Board, Sec. 102.8	6, 16
Rules and Regulations of the National Labor Relations Board, Sec. 102.58(c)	15

STATUTES

Administrative Procedure Act, Sec. 2(b)	15
Administrative Procedure Act, Sec. 6	15
National Labor Relations Board Act (61 Stat. 136)	3
National Labor Relations Act, Sec. 3(d)	6, 16
National Labor Relations Act, Sec. 6	6, 12
National Labor Relations Act, Sec. 8(a)(1)(2)(3)	3
National Labor Relations Act, Sec. 8(b)(1)(A) and (2)	3

PAGE

National Labor Relations Act, Sec. 10 6
National Labor Relations Act, Sec. 11 7
National Labor Relations Act, Sec. 11(1) 5, 8, 9, 11, 12
National Labor Relations Act, Sec. 11(d) 15
United States Code, Title 28, Sec. 1254 2
United States Code, Title 29, Sec. 151 et seq. 3
United States Code Annotated Title 29 (Supp.), Sec. 161 11

MISCELLANEOUS

House Report 3020 ..... 9, 10
1 Legislative History of the Labor-Management Relations Act of 1947, pp. 74, 201 (Nat. Lab. Relations Board, 1948) 9
1 Legislative History of the Labor-Management Relations Act of 1947, pp. 133, 261 (Nat. Lab. Relations Board, 1948) 9
Senate Bill 1126 10

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D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on October 29, 1957, granting the National Labor Relations Board's (hereinafter referred to as the "Board") request for enforcement of subpoenas *duces tecum* and *ad testificandum* directed to petitioners.

Opinions Below.

The opinion of the court below (Appendix A, *infra*) is not yet officially reported. The District Court rendered no opinion. The order of the District Court is set forth at R. 83-84. ("R" references are to the printed transcript of record used in the court below.)

Jurisdiction.

The judgment of the court below (Appendix B, *infra*) was made and entered on October 29, 1957. The jurisdiction of this court is invoked under 28 U. S. C. 1254.

Questions Presented.

At the written request of counsel for the General Counsel, the Regional Director of the Board (at Los Angeles) issued certain subpoenas *ad testificandum* and *duces tecum* directed to petitioners under the seal of the Board and under the facsimile signature of Abe Murdock, a member of the Board [R. 30-43]. Petitioners filed petitions to revoke subpoenas with the Regional Director. The Regional Director referred the petitions to revoke subpoenas to the Trial Examiner, who denied the petitions. Petitioners refused to obey the subpoenas. The Board filed with the District Court an application for an order requiring petitioners to obey the subpoenas. The District Court issued its order quashing the subpoenas. On appeal to the United States Court of Appeals for the Ninth Circuit, the order of the District Court quashing the subpoenas was reversed.

The questions presented are:

(1) Whether the Board has power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to issue subpoenas;

(2) Whether the Board has power under the National Labor Relations Act, as amended, to delegate to subordinates the authority to rule upon a petition to revoke a subpoena;

(3) Whether under the National Labor Relations Act, as amended, and Board Rules and Regulations, a subpoena may be issued upon the application of an attorney employed by the General Counsel of the Board.

Statutes and Regulations Involved.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*) and of the Board's Rules and Regulations (29 C. F. R. 102.1, *et seq.*, Supp. 1956) are set forth in the body of the petition.

Statement.

On April 30, 1956, the General Counsel of the Board issued through the Regional Director of Los Angeles a consolidated complaint against petitioners alleging unfair labor practices in violation of Section 8(a)(1), (2) and (3) of the Act and Section 8(b)(1)(A) and (2) of the Act. The consolidated complaint was issued and served on petitioners, together with a notice that a hearing would be conducted before a Trial Examiner of the Board on the allegations set forth in the complaint [R. 19-26].

On June 1, 4 and 5, 1956, at the request of an attorney for the General Counsel, the Regional Director at Los Angeles issued subpoenas *ad testificandum* and *duces tecum* directed to petitioners under the seal of the Board and under the facsimile signature of Abe Murdock, a member of the Board [R. 30-43].

On June 11, 1956, petitioners filed petitions to revoke subpoenas with the Regional Director asserting that (1) the Board could not delegate its power to issue subpoenas to the Regional Director, and (2) an attorney for the General Counsel is not a party to the unfair labor practice proceedings and hence is not entitled to the issuance of subpoenas. As to the *subpoenas duces tecum*, Petitioners Lewis and Schmidt also challenged the relevancy of the records and documents required to be produced [R. 44-51].

On June 11, 1956, the Regional Director referred the petitions to revoke subpoenas to a Trial Examiner who denied the petitions. Petitioners, nevertheless, refused to obey the subpoenas [R. 51-80].

The Board, by its General Counsel, on June 29, 1956, filed with the District Court an application for an order requiring petitioners to obey the subpoenas involved herein [R. 3-9].

Petitioners resisted enforcement of the subpoenas on the grounds that (1) the Regional Director did not have authority to issue the subpoenas; (2) the Trial Examiner did not have authority to rule upon petitioner's petitions to revoke subpoenas; and (3) an attorney for the General Counsel is not entitled to the issuance of subpoenas upon his application, since he is not a party to the proceedings. The objections to the relevancy of the documents and records required to be produced by the subpoenas addressed to Lewis and Schmidt were not renewed.

On July 30, 1956, the District Court issued its order quashing the subpoenas on the authority of *N. L. R. B. v. Pesante*, 119 Fed. Supp. 444 [R. 83-84]. The *Pesante* case held (1) that subpoenas issued under facsimile of

a Board member are valid under the Act; (2) however, that the Board must itself pass upon petitions to revoke subpoenas; and (3) that the General Counsel is not a "party" to a Board proceeding and hence neither he nor the attorneys under his supervision may request subpoenas.

On appeal the Court of Appeals reversed the order of the District Court. The Court dealt only briefly with the question of the power of the Board to delegate authority to issue subpoenas, citing *N. L. R. B. v. John S. Barnes Corp.* (7 Cir.), 178 F. 2d 156, where the Court held that a subpoena issued by a Regional Director under the facsimile signature of a Board member is valid.

On the power of the Board to delegate authority to a Trial Examiner to rule on petitions to revoke subpoenas, the Court noted that there was a conflict among the Circuits. The *Pesante* case, *supra*, 119 Fed. Supp. 444 and *N. L. R. B. v. Duval Jewelry Co.* (5 Cir.), 243 F. 2d 427, certiorari granted in the United States Supreme Court, October Term 1957, No. 234, hold that only the Board itself is authorized by Section 11(1) to hear petitions to revoke subpoenas; on the other hand, the Seventh Circuit takes a different view in *N. L. R. B. v. Gunaca*, 230 F. 2d 542. The Seventh Circuit decision is in accord with the decision in *N. L. R. B. v. International Typographical Union*, 76 Fed. Supp. 895. The Ninth Circuit followed the decision of the Seventh Circuit in the *Gunaca* case, *supra*, 230 F. 2d 542.

The Ninth Circuit Court agrees with petitioners that the statute itself and the legislative history are "somewhat favorable to appellees' [petitioners'] position." However, under a "rule of convenience" the Ninth Circuit finds that a holding that the power to rule on petitions

to revoke subpoenas is non-delegable "would substantially impede the effectuation of the Board's primary function." The Court concludes that, since the power to delegate has not been expressly or impliedly withdrawn under the statute, the Board under its rule-making authority (Sec. 6 of the Act) has the power to issue a rule delegating authority to a Trial Examiner to rule upon petitions to revoke subpoenas.

Finally, the Ninth Circuit held that the General Counsel is a party to an unfair labor practice proceeding relying primarily on Section 3(d) of the Act, which gives the General Counsel "Final authority on behalf of the Board in respect of the investigation of charges and issuance of the complaints under section 10, and in respect of the prosecution of such complaints before the Board." The Court distinguished the *Pesante* case, *supra*, which held that a Regional Director of the Board is not a party to a representation proceeding. The Ninth Circuit did not discuss the effect of Section 102.8 of the Board's Rules and Regulations, which does not include General Counsel within the definition of "party."

Reasons for Granting the Writ.

The holding of the Court below has an important impact upon the rights of the citizens of the United States, since it grants unlimited authority to an administrative body to delegate the exercise of the subpoena power—a power capable of oppressive use. The decision also has an important effect in the administration of the Act. The decision of the Court below involves a direct conflict with the decision of the Fifth Circuit in the case of *N. L. R. B. v. Duval Jewelry Co.*, *supra*, 243 F. 2d 427, certiorari granted in the Supreme Court of the United States,

October Term 1957, No. 234. The holding of the Court below presents a question concerning the proper application of this Court's decisions in *Cudahy Packing Co. v. Holland*, 315 U. S. 357 and *Fleming v. Mohawk Co.*, 331 U. S. 111.

We contend that the terms of the Act itself demonstrate conclusively that the subpoena power is not delegable. We further contend that the legislative history of the Act and the cases in point also support this view.

Section 11 of the Act provides with respect to the subpoena power as follows:

> "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—
>
> "(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its

opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that there are five sentences in subsection (1) of Section 11. The fifth sentence can be disregarded for present purposes. The Court's attention is called to a comparison of the first and fourth sentences as against the second and third sentences.

The first sentence, in providing for the examination of evidence and the right to copy evidence, gives the power to the Board "or its duly authorized agents or agencies" —a clear authority to delegate that power.

The fourth sentence, in providing for the administering of oaths, examination of witnesses and the receiving of evidence, also vests the power in any member of the Board "or any agent or agency designated by the Board for such purposes." Here again the authority given to the Board may be delegated.

On the other hand, the second sentence, which provides for the issuance of subpoenas, gives the power only to "The Board, or any member thereof." In the third sentence which provides for revocation of the subpoena, the power is given to "the Board."

The Ninth Circuit Court holds that there is no expressed or implied negation of the power to delegate in the Act. This is contrary to the approach taken in the

Pesante case, *supra*, 119 Fed. Supp. 444, and the *Duval* case, *supra*, 243 F. 2d 427, where the courts found that the Act itself bars delegation.

It is submitted that any person who reads Section 11(1) must conclude without reference to the legislative history, cases or other aids to construction, that Congress specifically provided for delegation by the Board when it intended such delegation and omitted the power to delegate when it intended that the Board, or a member thereof, should not delegate. If a statute is clear, the Court need not go outside the statute to construe it.

In addition to the clear language of the statute, the legislative history of the Act establishes that Congress intended that the power to issue subpoenas and to revoke subpoenas could not be delegated. References hereafter are to "Legislative History of the Labor Management Relations Act, 1947, Vol. I (National Labor Relations Board, 1948)."

The first step in the legislative process was H. R. 3020, as reported by the Committee on Education and Labor and as it passed the House of Representatives initially. (Legislative History, *op. cit.*, pp. 74, 201.) This version provided as follows:

> "Sec. 11. For the purpose of any proceeding before the Board, or before a member, examiner, or examiners thereof, or for the purpose of any investigation by the Administrator under Section 9—
>
> "(1) The Board, or any member thereof, *or any trial examiner* shall, upon application of the Administrator or any party to such proceedings, forthwith issue to the Administrator or to such party as the case may be, in the name of the Board, subpoenas requiring the attendance and testimony of witnesses

or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence or under his control, such person may petition the Board, *or its duly authorized agent or agents*, to revoke and the Board, *or such agent or agents*, shall revoke such subpoena if in its, *his or their* opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, *his or their* opinion, as the case may be such subpoena does not describe with sufficient particularity the evidence whose production is required. The Administrator, or any member of the Board, *or any examiner or examiners designated by the Board for such purposes*, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing." (Emphasis added.)

The language which should be noted particularly is italicized.

The original Senate version, S. 1126, as reported by the Committee on Labor and Public Welfare and H. R. 3020 as it passed the Senate initially, both provided as follows (Legislative History, *op. cit.*, pp. 133, 261):

"Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access

to, for the purpose of examination, nd the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any matter under investigation or in question, before the Board, its member, agent or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing."

The Court will note that the Senate Bill contained language entirely different from the House Bill.

Section 11(1) of the Act, as finally adopted (29 U. S. C. A. (Supp.), Sec. 161), is a compromise between the House and the Senate versions. The House provision for an automatic issuance of a subpoena plus the power to revoke was adopted, but the language of the House version regarding delegation of the subpoena power to a "trial examiner" (in the case of issuance of the subpoena) and the delegation to "duly authorized agent or agents" (in the case of revocation of the subpoena) was omitted. In addition, the Senate version was changed to permit the Board to issue subpoenas as well as "any member of the Board."

With reference to the legislative history, the Ninth Circuit recognizes that Congressional action was "favor-

able" to petitioners' position, but is "inconclusive." Having made the statement, the Court then drops its discussion of Congressional history and applies what we prefer to call a "rule of convenience," finding that it would make it extremely difficult, as a practical matter, for the Board to carry out its functions, if it did not have power to delegate the subpoena power. In our view, the Seventh and Ninth Circuits are engaging in judicial legislation and have failed to uphold the statute as written.

We submit that the change in language between the original House version and the final statute must lead to the conclusion that the Congress intended to permit delegation with respect to the powers granted in the first and fourth sentences of Section 11(1), but did not intend to permit delegation with respect to the power of issuing and revoking subpoenas contained in the second and third sentences.

The Ninth Circuit Court upheld the Board's delegation of power to revoke subpoenas under the rule-making power vested in the Board by virtue of Section 6 of the Act. The rule-making power can not serve as a source of delegation where the statute expressly, or by implication, withholds such power. *Fleming v. Mohawk Company, supra,* 331 U. S. 111, 121. An agency rule can not change positive provisions of the statute. *United States v. Gredzens,* 125 Fed. Supp. 867. We submit that the Act and the legislative history thereof clearly indicate that Congress intended that the Board itself exercise the subpoena power and that such power can not be delegated by rule, or otherwise.

This Court has expressed itself on the subject of delegation of the subpoena power in *Cudahy Packing Co. v.*

Holland, 315 U. S. 357 and *Fleming v. Mohawk Wrecking and Lumber Co.*, 331 U. S. 111. The Ninth Circuit Court held that these cases are not controlling, since they involved construction of a statute different from the National Labor Relations Act. The statute under construction in the *Cudahy* case, *supra*, 315 U. S. 357, is almost exactly the same as Section 11 of the National Labor Relations Act. We contend that the principles enunciated in the *Cudahy* case, *supra*, 315 U. S. 357, and the *Fleming* case, *supra*, 331 U. S. 111, are controlling and that a comparison of the two cases will show that the present case is governed by the *Cudahy* case.

The *Cudahy* case held that the Administrator of the Fair Labor Standard Act did *not* have the power to delegate to his subordinates the authority to issue subpoenas. This Court said in part (313 U. S. 365):

> "The entire history of the legislation controlling the use of subpoenas by administrative officers indicates a Congressional purpose not to authorize by implication the delegation of the subpoena power."

The legislative history of the Fair Labor Standards Act involved in the *Cudahy* case showed that a provision granting authority to delegate the subpoena power had been eliminated when the Bill was in Conference. We have already pointed out in connection with the present Act that the house bill provided for delegation of the subpoena power but that in Conference this provision was eliminated.

This Court said in the *Fleming* case, *supra*, 331 U. S. 111, 121, that under the rule-making power an agency may delegate a particular function, "unless by an express provision of the Act or *by implication* it has been with-

held." (Emphasis added.) The present Act has, by implication, clearly withheld the power to delegate the subpoena power. Therefore, the existence of the rule-making power is not sufficient to overcome the implication of the statute.

The Ninth Circuit upholds the power to delegate on the basis that it would be difficult for the Board to perform personally the subpoena function.

It is, of course, true that if the National Labor Relations Board followed the plain and simple dictates of the Act and subpoenas were issued by the Board or members of the Board, and revoked by the Board the members would have more work than if they merely signed a stack of subpoenas in blank and permit the Regional Director and the Trial Examiner to issue and revoke them. But there is good reason why that should be so. The *Cudahy* case stated the principle very well in answer to the argument that it would be hard for the Administrator of the Fair Labor Standards Act to issue the subpoenas personally (315 U. S. 357, 363):

> "The Administrator . . . points to the wide range of duties imposed upon him, the vast extent of his territorial jurisdiction, and the large number of investigations required for the enforcement of the Act. From this he argues that Congress must have intended that he should be permitted to delegate his authority to sign and issue subpoenas. But this argument loses force when examined in the light of related provisions of the Act and of the actual course of Congressional legislation in this field.
>
> "Unlimited authority of an administrative officer to delegate the exercise of the subpoena power is not lightly to be inferred. It is a power capable of

oppressive use, especially when it may be indiscriminately delegated and the subpoena is not returnable before a judicial officer."

We think the conclusion is inescapable that every factor under consideration by this Court points to the result reached in the *Cudahy* case—the subpoena power is not delegable.

Finally, we contend that the subpoenas here involved are invalid because they were issued without a proper application therefor. Section 11(d) of the Act provides that a subpoena shall be issued "upon application of any party to such proceedings." The term "party" is not defined in the Act. Section 2(b) of the Administrative Procedure Act defines "party" as follows:

> "'Party' includes any person or agency named or admitted as a party, or properly acting and entitled as of right to be admitted as a party, in any agency proceeding."

Section 6 of the Administrative Procedure Act provides:

> "Agency subpoenas authorized by law shall be issued to any *party* upon request and, as may be required by rules of procedure, upon a statement or showing of general relevance and reasonable scope of the evidence sought." (Emphasis added.)

It is clear that under the Administrative Procedure Act the General Counsel and counsel for the General Counsel are not parties to this proceeding since they have not been named or admitted as a party.

Section 102.58(c) of the Board's Rules and Regulations provides that a subpoena shall be issued "upon

application . . . in writing by any party." Section 102.8 of the Board's Rules and Regulations provides:

> "The term 'party' as used herein shall mean the regional director in whose region the proceeding is pending, and any person named or admitted as a party, or properly acting and entitled as of right to be admitted as a party. . . ."

The Ninth Circuit Court failed completely to discuss the effect of the Board's own Rules and Regulations which defined the term "party." With reference to the definition contained in the Administrative Procedure Act, the court below said that the definition "is not decisive."

Under the Board's own definition of "party," as set forth above, it is apparent that the applications for the subpoenas were not made by a "party" as required by the Act and by the regulations. The application for every subpoena was made by E. Don Wilson described in the subpoenas as "counsel for the General Counsel."

The Ninth Circuit Court found that the General Counsel is a party to an unfair labor practice proceeding under the authority of Section 3(d) of the Act and the Ninth Circuit Court's definition of "party," as including any one taking part in a proceeding. (*Fong Sik Leun v. Dulles*, 226 F. 2d 74, 81.)

The usual legal definition of a "party" certainly does not include an attorney (as such). The generally accepted definition of "party" is entirely at odds with the view that the General Counsel, or his attorney, who are representatives and employees of the Board, are parties.

There is no basis for a construction of the word "party" to include persons directly associated with the agency before whom both sides (union and management) in an adversary proceeding are submitting, or are about to submit, their causes. In the *Pesante* case, *supra*, 119 Fed. Supp. 444, the District Court stated that in its opinion Congress by the Act and the Board by its regulations intended to, and did, leave it up to the adversaries (union and management) to apply for subpoenas.

We contend that the General Counsel is no more a party to this proceeding than would be the Solicitor General in a proceeding brought on behalf of the United States Government. The General Counsel is not a party as defined in the Administrative Procedure Act or the Board regulations. It follows that the subpoenas are invalid because they were issued without a proper application therefor.

The questions presented by this case are of great and recurring significance in the administration of the National Labor Relations Act. The important nature of these issues has already been recognized by this Court when it granted certiorari in the case of *N. L. R. B. v. Duval Jewelry Co.*, October Term 1957, No. 234. The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the rights of the citizens of this country, make this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

Conclusion.

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

National Labor Relations Board, Appellant, vs. D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Barnville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, Appellees. No. 15,307.

Filed October 29, 1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: FEE, BARNES and HAMLEY, Circuit Judges.

BARNES, *Circuit Judge:*

The National Labor Relations Board appeals from an order of the District Court denying enforcement to certain subpoenas duces tecum and ad testificandum purportedly issued by the Board and directed to the appellees.

On April 30, 1956, the General Counsel, by the Regional Director in Los Angeles, California, filed a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America, alleging that the company and the union were engaging in various unfair labor practices in violation of the Labor-Management Relations Act of 1947, (hereafter "Act"). Pursuant to the written request of counsel for the General Counsel, the Regional Director, acting under Section 11(1) of the Act, issued the subpoenas in question

under the seal of the Board and the facsimile signature of Abe Murdock, a member of the Board. Appellees filed petitions to revoke the subpoenas with the Regional Director principally on the grounds that (1) the Board lacked authority to delegate its power to issue subpoenas to the Regional Director, and (2) counsel representing the General Counsel is not a "party" to an unfair labor practice proceeding and therefore is not entitled to the issuance of subpoenas. The Regional Director referred the petitions to the trial examiner. The trial examiner refused to quash the subpoenas. Appellees remained adamant in their determination not to comply with the subpoenas. The Board then filed with the court below an application for an order requiring appellees to obey the subpoenas. The unfair labor practice proceeding was continued pending the disposition of this matter. The appellees resisted enforcement of the subpoenas on the two grounds stated above, and additionally, on the ground that the trial examiner lacked authority to pass upon their petitions. The court below sustained their position without opinion, citing only the decision in National Labor Relations Board v. Pesante, S. D. Calif., 119 F. Supp. 444.

There are three questions raised by this appeal. (1) Does the Board have authority under the Act to delegate to its subordinate, the Regional Director, the power to issue subpoenas? (2) Does the trial examiner have authority to rule on petitions to revoke subpoenas? (3) May a valid subpoena be issued at the request of counsel for the General Counsel?

Board counsel conceded on oral argument that the Board must prevail on all three issues to gain a reversal.

Each issue turns on the meaning of Section 11(1) of the Act.[1] They will be discussed in the order stated above.

I. *Delegation of Power to Issue Subpoenas*

Section 11(1) provides that the "Board, or any member thereof" may issue subpoenas. Appellees' argument, in essence, is that the section means what it says, the Congress knew how to make the power delegable if it wanted to do so as evidenced by other portions of Section 11(1) authorizing the Board or "its duly authorized agents or agencies" to perform certain functions, and that Congress' failure to make the power expressly delegable manifests an intention that it be non-delegable.

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[1] It provides: "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whole production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place in the United States or any Territory or possession thereof, at any designated place of hearing."

This question and the next one relating to the delegation of power to pass on petitions to revoke subpoenas pose similar problems of statutory construction. The basic problem, and a frequently recurring one in modern times, is to ascertain whether when a particular power is granted to a person or body of persons, the power is delegable to subordinates, and if delegable at all, to which subordinates it is delegable.

In each instance in the case at bar Section 11(1) explicitly empowers only the Board, or a member thereof, to perform certain functions. Nowhere does the Act make the particular powers delegable, but neither does it anywhere expressly prohibit delegation. Does this silence indicate prohibition or permission?

There is no short and automatic answer to this difficult and complex but very practical question. There is not even the frequently found presumption with which to tilt the scales. The determination of the question calls for a studied consideration of the Act, its legislative history, and its legislative objectives.

We start the journey, as with all statutes, by examining the literal wording of the section. The language of a statute is the best and most reliable index of its meaning. Where the language is clear and unequivocal it is determinative unless the literal language does not comport with the intent and objectives of the statute viewed as a whole. However, where as in the instant cause, the statute is completely silent on the point in question, it is necessary to analyze that statute as a whole, and its history and purposes, to ascertain what interpretation must be ascribed to the silence.

In regard to the delegability of the Board's subpoena issuing power to a Regional Director, no court which has considered this question has construed Section 11(1) of the Act in the narrow and restricted manner appellees urge upon us. On the contrary, all courts which have passed on the merits of this issue have interpreted the statute as empowering the Board to delegate the subpoena power. The leading decision on this precise point is National Labor Relations Board v. John S. Barnes Corp., 7 Cir., 178 F. 2d 156, where the Court held that a subpoena issued by a Regional Director under the facsimile signature of a Board member is valid. That decision has had the subsequent approval of the Fifth Circuit. Edwards v. National Labor Relations Board, 5 Cir., 189 F. 2d 970; Jackson Packing Co. v. National Labor Relations Board, 5 Cir., 204 F. 2d 842. Even the Pesante decision, supra, held in favor of the Board on this question. The opinion in the Barnes case is sound and well-reasoned. It is fully consonant with the policies and purposes of the Act. Appellees put forth no reasons which persuade us that these cases are erroneous and should be disapproved. Therefore, we hold that subpoenas may validly be issued by a Regional Director under the facsimile signature of a Board member.

There is nothing in the Supreme Court opinions in Cudahy Packing Co. v. Holland, 315 U. S. 357, and Fleming v. Mohawk, 331 U. S. 111, which compels a different result or casts doubt upon the validity of our resolution of this issue. Those cases are not controlling. The Cudahy decision merely held that the Fair Labor Standards Act did not grant the Administrator the power to delegate his subpoena power to subordinates, while on the other hand, the Mohawk case held that the Admin-

istrator of the Emergency Price Control Act was authorized to delegate the authority to issue subpoenas. Each of those cases involved the construction of a statute different from that which concerns us. Accordingly, those decisions, one upholding the delegability of this power and the other denying it, do not govern the instant case.

II. *Delegation of Power to Revoke Subpoenas*

Section 11(1) states in pertinent part that "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas" and that the person to whom the subpoena is directed "may petition the Board to revoke, and the Board shall revoke, such subpoena" if the evidence sought is not relevant or is not described with sufficient particularity.

The trial examiner, not the Board, denied appellees' petitions to revoke the subpoenas. It was his action which was reviewed by the court below. If he lacked authority to pass on these petitions, then there has been no review of this matter by the proper administrative body. If such be the posture of these proceedings, it was prematture to bring these proceedings before the court below before the proper and duly constituted body had passed on the petitions. Thus, if appellees' position be sustained on this point, the order denying enforcement must be affirmed.

The court below relied solely on the Pesante decision. There it was held that only the Board itself is authorized by Section 11(1) to sit on petitions to revoke subpoenas. The Fifth Circuit in National Labor Relations Board v. Duval Jewelry Co., et al, 243 F. 2d 427, agreed with

the Pesante decision insofar as subpoenas duces tecum are concerned. In respect to subpoenas ad testificandum, the Fifth Circuit held that since Section 11(1) on its face makes no provision as to procedure to test the validity of subpoenas of this type, application for their enforcement cannot be considered premature even if initially reviewed by a trial examiner.[2]

The Seventh Circuit takes a different view. In National Labor Relations Board v. Gunaca, 7 Cir., 230 F. 2d 542, it affirmed, on the opinion below, N. L. R. B. v. Gunaca, 135 F. Supp. 790, a decision upholding the right of a trial examiner to pass on petitions to revoke subpoenas.[3] Both the Court of Appeals and the District Court in the Gunaca case considered the Pesante case, and the considerations therein set forth, and refused to follow. This is also the position taken by then District Judge Medina in National Labor Relations Board v. International Typographical Union, 76 F. Supp. 895. For the reasons hereinafter set forth, we believe that this is the correct view.

The approach taken in the Pesante and Duval cases is that the Act itself bars delegation. We find no such preclusion. Certainly there is no express negation of the power to delegate. The Act sanctions the Board to rule on these petitions; but it does not expressly forbid the Board to delegate this function. Nor do we feel it mandatory to imply such an intent. The Congressional history, though somewhat favorable to appellees' position, is real-

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[2]We need not pass on the validity of this distinction in light of our resolution of this issue.

[3]See also N. L. R. B. v. John S. Barnes Corp., supra.

istically meager and inconclusive.[4] The Act was discussed prolificially in Congress, but the delegability of powers granted by Section 11(1) was not. We concur in Judge Grubb's statements in the Gunaca case, supra, 135 F. Supp. at 794:

> "It would seem to this Court that one should be very slow to presume that the Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where the testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N. L. R. B. that would be involved. Such construction would make it impossible as a practical matter for the N. L. R. B. to carry out its functions. Certainly they couldn't carry them out expeditiously as Congress no doubt intended. Labor peace or proper labor relations would be sacrificed to innumerable administrative

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[4]The original House Bill, H. R. 3021, provided that a person to whom a subpoena had been directed could "petition the Board, or its duly authorized agent or agents to revoke and the Board, or such agent or agents, shall revoke such subpoena if in its, his, or their opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, his, or their opinion, as the case may be, such subpoena does not describe with sufficient particularity the evidence whose production is required." The original Senate Bill, S. 1126, contained no provision dealing with petitions to revoke subpoenas. The Section as finally approved was essentially the House version with the express delegation of power to pass on petitions to revoke subpoenas deleted. Whether this revision was made because it was felt that the added language was superfluous or because Congress doubted the wisdom of granting this power to anyone other than the Board itself, is not disclosed by the Committee or Conference reports or Congressional debates. Taken alone, the change of language, while helpful to appellees, is not persuasive.

> delays . . . . Such construction would put an impossible burden on the Board."

The Court of Appeals approves Judge Grubb's "well reasoned opinion," considers his conclusions sound, and his result correct.

The N. L. R. B. was established to facilitate the peaceful settlement of labor disputes. The practical difficulties in administration which would arise as a consequence of holding that the power to rule on petitions to revoke subpoenas is non-delegable would substantially impede the effectuation of the Board's primary function. Accordingly, it is unreasonable to attribute to Congress an intention to compel such a result.

If the power to delegate has not been withdrawn, as we believe it has not, has it been granted affirmatively?

The Mohawk decision supplies the answer to that question. There, as here, the particular statute in question contained a broad rule-making power. Section 201(d) of the Emergency Price Control Act provided:

> "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper to carry out the purposes and provisions of this Act."

Addressing itself to the question of whether this Section could be relied upon as a basis for delegating certain functions, the Supreme Court said, 331 U. S. at 121,

> "Such a rule-making power may itself be an adequate source of authority to delegate a particular function, unless by express provision of the Act or by implication it has been withheld. See Plapao Laboratories v. Farley, 67 App. D. C. 304, 92 F. 2d 228."

Section 6 of the Labor-Management Relations Act vests the Board with as much rule-making authority as that possessed by the Administrator under the E. P. C. A. It reads:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

Acting pursuant to this authority, the Board promulgated, in Section 102.35 of its Rules and Regulations, the rule that "the trial examiner shall have authority . . . (c) to rule upon petitions to revoke subpoenas."

We hold that this rule of procedure is within the legitimate purview of the Board's power under Section 6 of the Act. The Board, of course, may not enlarge its authority beyond the scope intended by Congress, but the Board, where such restrictive intention is not shown, may adopt rules and regulations to carry out its myriad functions in a manner consistent with the fulfilment of the purposes of the Act. This is exactly what has been done here.

III. *General Counsel As a Party to an Unfair Labor Practice Proceeding.*

We come then to the third question tendered by this appeal. Appellees assert that the General Counsel (or his representative) is not a party to an unfair labor practice proceeding and hence cannot obtain the issuance of subpoenas.

The term "party" is not defined in the Act. The definition contained in the Administrative Procedure Act is not

decisive.[5] Again, we resort to related provisions, and the policies of the Act.

This Court has declared that "in its broadest meaning the word 'party' includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not." Fong Sik Leung v. Dulles, 9 Cir., 226 F. 2d 74, 81. Is the General Counsel under the Act a "party" to an unfair labor practice proceeding for purposes of securing the issuance of subpoenas?

The 1947 amendments to the National Labor Relations Act expanded the authority and enhanced the status of the General Counsel in connection with the conduct of unfair labor practice proceedings.

> "By §3(d), supra, the authority formerly exercised by the Board to investigate charges and to issue complaints under §10 was vested in the general counsel. The well-understood purpose of Congress here was to effect a separation of the prosecuting and adjudicating functions within the Board." Haleston Drug Stores v. National Labor Relations Board, 9 Cir., 187 F. 2d 418, 421.

By virtue of §3(d) the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." His decision on whether to issue a complaint charging an unfair labor practice is final and

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[5]Section 2(b) of the A. P. A. defines "party" as follows:

"Party includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as as a party, in any agency proceeding."

is not reviewable by either the Board or the courts. Lincourt v. National Labor Relations Board, 1 Cir., 170 F. 2d 306; Hourihan v. National Labor Relations Board, D. C. Cir., 201 F. 2d 187; Anthony v. National Labor Relations Board, 6 Cir., 204 F. 2d 832. If he decides to direct issuance of a complaint, it is his responsibility to prosecute the matter. In this role also he exercises broad powers. International Union, etc. v. National Labor Relations Board, 9 Cir., 231 F. 2d 237, 242. Here then is an official who has life-or-death authority over the initiation of an unfair labor practice proceeding and who, if he determines that such proceedings should be commenced, is entrusted with the task of prosecution. Yet appellees urge that this official lacks authority to apply for the issuance of a subpoena. The argument is untenable.

The Pesante and Duval cases are neither contrary nor apposite. Both involved the question of whether a Regional Director was a party to a representative hearing, as distinguished from an unfair labor practice proceeding.[6] A Regional Director's duties in respect to representative hearings are far different from those the General Counsel performs in connection with unfair labor practice proceedings.

One point remains. It is that counsel for the General Counsel, not the General Counsel himself, sought the

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[6] In Pesante the court held that a Regional Director was not a "party" in a representative hearing within the meaning of Section 11(1) of the Act and therefore was not entitled to the issuance of a subpoena. The Fifth Circuit, in the Duval case, held directly contrary to Pesante and expressly rejected the reasoning in the latter opinion. Of course, we need not decide between the opposing views in the case at bar.

subpoenas. No citation of cases is necessary to restate the rule that in legal contemplation counsel representing counsel occupies the identical legal status of the person he represents. Therefore, if the General Counsel could apply for the issuance of subpoenas, as we have held, counsel representing him could also do so validly.

The order of the District Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

(Endorsed:) Opinion. Filed October 29, 1957.

Paul P. O'Brien, Clerk.

APPENDIX B.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

National Labor Relations Board, Appellant, vs. D. B. Lewis, President, Lewis Food Company, et al., Appellees.

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this court.

(Endorsed:) Judgment. Filed and entered: October 29, 1957.

PAUL P. O'BRIEN, Clerk